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BY HAND

May 16, 2005

Ms. Mary Dove
Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 5611

Dear Ms. Dove:

Through this letter, the Missouri Democratic State Committee and Rod Anderson in his official capacity as treasurer (collectively, the "Party"), respond to the General Counsel's Brief recommending that the Commission find probable cause to believe a violation occurred in this matter. The Party respectfully submits that the circumstances do not counsel toward such a finding.

INTRODUCTION

Despite the Party's good faith and timely participation in the conciliation negotiations, the General Counsel apparently chose to recommend a finding of probable cause because the

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As with the reason-to-believe finding, the General Counsel's Brief relies entirely upon the Final Audit Report that generated this matter. However, the Brief acknowledges that the Final Audit Report was incorrect in some ways – specifically, in the number and amounts of allegedly prohibited contributions identified. Moreover, the Brief does not discuss the Party's contention that the Commission cannot fairly seek civil penalties from the 2000 cycle based on "violations" of reporting procedures not clearly set forth until 2001.

DISCUSSION

This matter arises wholly from a Commission audit of the Party's 2000 election cycle activities. After the Commission approved the Final Audit Report, the General Counsel opened this MUR. At all stages, the General Counsel has relied entirely on the Final Audit Report. The Commission's reason to believe finding contained no legal or factual analysis whatsoever – it simply attached a cover letter to the Final Audit Report. The General Counsel's Brief similarly relies on that report.

There are two problems, however, with this reliance:

First, the General Counsel's Brief indicates that there were errors in the Final Audit Report, while neither identifying nor explaining them. For example, it says that the State Party "accepted \$69,500 in prohibited contributions." General Counsel's Brief at 4. Yet.

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this figure is \$24,500 less than the amount indicated in the Final Audit Report and adopted at the reason-to-believe stage. *Compare* General Counsel's Brief at 4 with Final Audit Report at 15.

The General Counsel's Brief does not explain this difference. However, the Party understands from the Office of General Counsel that contributions totaling \$20,000 from Zimmerman Properties LLC, Greene Law Firm and Michael Sternberg, identified by the auditors as prohibited, were found by the Office of General Counsel to have been permissible. Moreover, a contribution identified by the auditors as a \$5,000 contribution from Tatlow Gump and Faiella LLC was in fact a \$500 contribution.¹

Second, the General Counsel's Brief does not discuss the legal arguments made by the Party regarding the disclosure of "split" federal/nonfederal contributions. It accepts the findings of the Final Audit Report in this respect without discussion.

The Commission did not state the reporting requirements that the General Counsel seeks to enforce until after the conduct in this matter had already occurred. *See* Conciliation Agreement, MUR 4961 (conciliation agreement adopted in July 20, 2001). Indeed, in Advisory Opinion 2001-17, issued a year after the events in this matter took place, the Commission acknowledged that its rules "do not specifically address the reporting of contribution checks where the proceeds are intended to be split between Federal and Non-Federal accounts."²

Thus, the Party entered the 2000 election cycle with no reason to think that its disclosure of "split" contributions was inappropriate. After the audit of the Party's 2000 cycle activities was completed, the Party complied with all but one of the auditors' recommendations. When it amended its reports, it did not alter its treatment of "split" contributions. The Party believed that these findings were an exercise in "20/20

¹ The Party actually transferred this \$24,500 in "prohibited" contributions from its federal account to its nonfederal account in reliance on the auditors' recommendations. *See* Final Audit Report at 15.

² Before the Commission's audit of the Party's 2000 election cycle activities, none of the previous Final Audit Reports issued to the Party laid out the method of disclosure that was set forth in Advisory Opinion 2001-17 and insisted upon by the General Counsel's Brief.

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hindsight," applying reporting procedures set forth in 2001 to reports filed in 1999 and 2000.³

At every stage of this MUR, there has been no legal argument from the General Counsel whatsoever on the central legal issue in this case – what the requirements were in the 2000 election cycle for disclosing "split" checks, and whether civil penalties can fairly be sought here, given that the Commission said that the rules "do not specifically address" the subject in the year *after* the events in this matter transpired. Advisory Opinion 2001-17. The General Counsel has simply followed the findings of the Final Audit Report and presumed that a violation occurred. The Party respectfully suggests that this is not consistent with the requirement that the General Counsel set forth his "position on the ... legal issues of the case ..." 11 C.F.R. 111.16(a).

These problems show that the case against the Party is not open-and-shut. A finding of probable cause could fairly be characterized as arbitrary and capricious, if such a finding resulted from unquestioned reliance on a flawed audit report, unexplained deviation from that report's findings, and unwillingness to discuss genuine issues of law.

The Party has no desire to see this matter proceed to litigation. It would prefer to devote its energy and resources to building its compliance and reporting procedures. It has already taken concrete steps to do just this. It has a new executive director and new treasurer. It has retained a compliance professional in the Washington, DC area with senior national party committee experience to prepare its reports, to respond to Commission requests for additional information, and to supervise all aspects of its compliance activities.

³ The General Counsel's Brief characterizes the Party as having "refused" to file amended reports. This is not so. The Party filed amended reports that conformed *in every other respect* to the auditors' recommendations. Indeed, the Party relied on the auditors' work, even in some instances when it had misgivings about that work. For example, it amended its reports to disclose debts identified by the auditors, even though it did not fully understand that manner in which the auditors had identified those debts.

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Alternatively, the Party respectfully requests the Commission to decide against the General Counsel's recommendation, in light of the concerns stated above.

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Very truly yours,



Brian G. Svoboda

Counsel to the Missouri Democratic
State Committee and Rod Anderson,
in his official capacity as treasurer.

BGS:mw

cc: Chairman Scott Thomas
Vice Chairman Michael Toner
Commissioner David Mason
Commissioner Danny McDonald
Commissioner Brad Smith
Commissioner Ellen Weintraub
Lawrence Norton, Esq.
Jonathan Bernstein, Esq.
Beth Mizuno, Esq.